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No. 71-1120

In the Supreme Court of the United States

OCTOBER TERM, 1971

RICHARD SCHULMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUI

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial with others in the United States District Court for the Southern District of New York, petitioner was convicted of having conspired to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. 891 and 894, and of having committed the substantive offenses on two occasions. He was sentenced to concurrent seven-year prison terms, to run consecutively to another sentence then being served. The court of appeals affirmed (Pet. App. 15-24).

The pertinent facts are undisputed and are set forth fully in the court of appeals' opinion. Petitioner's sole contention is that the court below incorrectly con-

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cluded that the district court's admission of certain statements by codefendant Mainetti (with respect to whom the court ultimately dismissed the charges), under the co-conspirator exception to the hearsay rule was, if error at all, harmless. The evidence independent of the hearsay statements was, as the court of appeals pointed out (Pet. App. 20–21), sufficient under the "fair preponderance" test to show Mainetti's participation in the conspiracy. See *United States* v. *Geaney*, 417 F. 2d 1116, 1119–1120 (C.A. 2), certiorari denied *sub nom. Lynch* v. *United States*, 397 U.S. 1028. The only remaining question is whether his statements were made in furtherance of the conspiracy. The court of appeals held that "two and possibly all three of the three contested declarations were properly admitted" (Pet. App. 21). Its finding of harmless error is confined to the third of the declarations and is fully justified by the facts set out in the opinion (Pet. 22–23).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1972.